No. 2674

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING Co. (a corporation),
Plaintiff in Error,

vs.

SAMSON IRON WORKS (a corporation),
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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Filed this.....day of July, 1916.

F. D. Monckton,
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

Plaintiff asks particularly for the further consideration of one question decided here which is of utmost importance to the manufacturers and purchasers of all classes of mechanical and electrical apparatus. Transactions involving such property are now invariably conducted on the basis of conditional sale. This form of bargain has been fostered by the courts, particularly in the western

states. *(Liver v. Mills,* 155 Cal. 459). It has been recognized to the fullest extent by the Supreme Court of the United States. *(Detroit Steel Co. v. Sistersville Co.,* 233 U. S. 712). The extremely speculative character of the undertakings in which such machinery is used has made it necessary and proper that manufacturers protect themselves by reservation of title against inability of the purchaser to pay the price. In assuring to the seller the benefits of this stipulation, no court has ever converted it into a burden. That is precisely what the decision here has accomplished.

The effect of this decision will not be confined to an adjustment of the rights of the parties arising out of the controversy before the Court. It will be more far-reaching than that. It will be a disturbing factor in the law of sales.

The law is well settled that the sole difference between an absolute and a conditional sale lies in the reservation of title. In other respects the same rights and obligations are created by both; the same remedies accrue. But the decision here makes an unexpressed and, we believe, an unintended distinction between the two, thereby injecting into settled practice an element of confusion which, it is respectfully submitted, the Court should be quick to dissipate.

This case is concerned with the rights of a conditional vendor where after partial delivery the purchaser repudiates the contract. This Court has de-

cided that by reason of the sale to other parties of the undelivered apparatus, the seller was "no longer in condition to waive its title to the property, or to transfer the title to the defendant. It had elected to retain the title."

Bearing in mind that the plaintiff here sued on the theory that it waived its title to the generator delivered and installed, the meaning of the decision is that the sale of the remainder operated as an election to retain title to all the apparatus under the contract.

The word "election" means a choice between different courses of action. Therefore, in order that plaintiff's conduct may be termed an election, there must necessarily have been some alternative open to plaintiff. If plaintiff was compelled to sell the second and third generators, that act was not an election. The law of California and of the western states, the law administered by the Federal Courts, the law of every jurisdiction, except New York, in fixing the vendor's measure of damages, deducts the market value of the undelivered property—in other words, the amount which a sale thereof in the open market will yield. The vendor is, therefore, forced to sell what is on hand so as to mitigate damages. Because it did with the second and third generators what the law compelled it to do, shall the plaintiff be said to have prejudiced its rights in respect to the generator which it had delivered and installed? In so deciding, this Court has in effect held that plaintiff had no election at all.

These questions are fully and carefully considered in sections 4 and 6 of the reply brief on file. (Pages 13-34). The authorities are there collected. It is shown that as to the articles undelivered the reservation of title had not become operative and, therefore, in this respect, was not susceptible of waiver. It is shown that there was no necessary relation between the status of the first generator and the other two. Hence, plaintiff's conduct with respect to the undelivered apparatus could not affect its rights to recover for that which had been installed. That the contract provided a single total price for all the apparatus is material only to the assessment of the plaintiff's damages. The suit for the whole or part of the purchase price—the act which accomplishes a waiver of title of the delivered property—is always an action on the contract. The reply brief even contains the citation of an authority where under an entire contract of conditional sale the court refused to permit the seller to retake for default in payment that part of the apparatus which had been delivered to the purchaser. The basis of this decision was the existence of a counterclaim in favor of the purchaser arising out of the seller's failure to deliver the remainder.

Surely, these arguments and the authorities supporting them are worthy of some consideration at the hands of this Court. But they are not mentioned. For all that appears in the opinion, the reply brief may not have been written. The question is one of great moment to the plaintiff and thousands

of others doing business upon the same basis of bargain. The amount involved in this suit is not large. As it often happens, plaintiff has in mind here not so much the settlement of the particular dispute as the determination of a legal problem in such a manner that a precedent for the courts and thus a definite guide for future conduct in business will be had. If the reasoning and authorities presented in the reply brief do not control the issue at bar, it is of the highest importance that the decision here point out wherein they can be distinguished. As the opinion now stands, there is no certainty that these arguments were brought to the Court's attention; the fact that they are fully presented in the brief will certainly not suffice to show that they were in the Court's mind. Thus, the question will remain to be decided in future litigation and in the meantime the subject matter will be embraced in doubt and uncertainty.

II.

It is pertinent here to point out other features in which the plaintiff's case merits further consideration. In the opinion it is said:

> Nor do we find that the instructions so given by the court are subject to the objection that the jury were thereby precluded from awarding plaintiff damages for the expense of installation and removal of the first generator.

Plaintiff made no such objection. On the contrary, the fact that the trial court *did* instruct the

jury that such was the measure of plaintiff's damage was relied on as error. Plaintiff had offered no evidence upon this theory. In the briefs it complained that the trial judge had restricted its recovery to these particulars and had prohibited any verdict on account of the price or value of the first generator.

III.

Finally, there is a count in the complaint in *indebitatus assumpsit* for the reasonable value of the first generator. The opinion holds:

> To sue in *indebitatus assumpsit* is not to sue for the purchase price. Barrere vs. Somps, 113 Cal. 97.

The court thus decides inferentially that where there has been partial delivery and a repudiation by the vendee, the common count will not lie. The reply brief (section 5) points out that the case cited does not concern this question at all. Authority is there presented which clearly announces the principle that recovery may be had in general *assumpsit* for the reasonable value of partial performance under a contract of unconditional sale.

The opinion of the Court suggests no reason why the same rule should not obtain in the case of a conditional sale. On the contrary, the reply brief cites two cases in which the conditional vendor is said to be entitled to sue either for the price or value of the

article. Here, again, is a distinction made by the Court between conditional and absolute sales for which no reason appears and no authority can be found.

It is therefore, respectfully submitted that a rehearing should be granted.

Dated, San Francisco,
July 26, 1916.

CAMPBELL, WEAVER, SHELTON & LEVY,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

DAVID L. LEVY,
Of Counsel for Plaintiff in Error and Petitioner.